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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

HALEY SAGE ROBERTSON BROZMAN, as Trustee, etc., Plaintiff and Appellant, v. ZOE BROZMAN et al., Defendants and Respondents.	H042283 (Santa Cruz County Super. Ct. No. PR046001)

I. INTRODUCTION

Shep Brozman[1] created a trust which provided that, upon his death, assets from the trust would be distributed to separate subtrusts for the benefit of his three sons, Andrew, Owen, and Robert. Shep's trust in Article II.D. also gave each son a testamentary power of appointment over the subtrust assets as follows: "If a beneficiary dies with assets remaining in his . . . separate trust, upon the beneficiary's death the beneficiary may appoint his . . . trust to or for the benefit of one or more of any of my *lineal descendants and their spouses* (*excluding from said class, however, such beneficiary* and such beneficiary's creditors, estate, and creditors of such beneficiary's estate)." (Italics added.) Shep's trust further provided that, if a son failed to effectively appoint the assets

[1] Since the Brozman family members have the same surname, we will refer to them by their first names for purposes of clarity and not out of disrespect.

of a subtrust, then upon the son's death the subtrust would be held for the son's lineal descendant.

One of Shep's sons, Robert, executed a will in 2010, in which he exercised the power of appointment by distributing the assets of his subtrust to a trust he and his wife, appellant Haley Sage Robertson Brozman, had created (the Robert and Haley trust).

After Shep died in 2009 and Robert died in 2013, Haley petitioned the probate court for an order requiring the trustee of Robert's subtrust, respondent Eric Weiss, to transfer the assets in Robert's subtrust to her, as trustee of the Robert and Haley trust. Respondent Zoe Brozman, Robert's daughter from a prior marriage, objected to the petition.

The probate court denied Haley's petition. The court determined that Robert's power of appointment could not be exercised solely in favor of a spouse, such as Haley, or in favor of the trust Robert had created with Haley. In reaching this conclusion, the court determined that Shep's trust was unambiguous regarding the power of appointment granted to Robert, and that extrinsic evidence of Shep's intent was inadmissible.

On appeal, Haley contends that Robert properly exercised the power of appointment pursuant to his father Shep's trust by appointing subtrust assets to the Robert and Haley trust. She also argues that declarations from the attorney who drafted Shep's trust provided uncontradicted evidence that Shep intended her to be a permissible appointee, and that the probate court prejudicially erred in excluding this extrinsic evidence of intent.

For reasons that we will explain, we will affirm the order.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. *The Brozman Family*

Shep had three sons, Andrew, Owen, and Robert. Robert was married to Haley. The couple had no children from their marriage. Robert had one child, a daughter Zoe, born during a prior marriage.

B. *The Trusts and the Will*

1. Shep's Trust and Robert's Subtrust

Shep executed a trust in 2008 (Shep's trust) while he was a Florida resident. The trust states that it is governed by Florida law. The trust provides that upon Shep's death, specified amounts of money are to be distributed to certain people, such as his sisters and a friend. The remaining assets in the trust are to be divided and held in separate trusts for the benefit of Shep's three sons, including 40 percent for Robert (Robert's subtrust). Each son is to serve as trustee of his own subtrust, and Weiss is to become trustee if any son is unable to serve. If a son does not survive Shep, then the trust property intended for that son is instead to be divided among and held in separate trusts for that son's lineal descendants then living. The beneficiary of each subtrust is to receive (1) the net income of the subtrust and (2) the amount of principal that is proper for the welfare of the beneficiary.

Article II.D. of Shep's trust gives the beneficiary of each subtrust a testamentary power of appointment over the subtrust assets as follows: "If a beneficiary dies with assets remaining in his or her separate trust, upon the beneficiary's death the beneficiary may appoint his or her trust to or for the benefit of one or more of any of *my lineal descendants and their spouses* (*excluding from said class, however, such beneficiary* and such beneficiary's creditors, estate, and creditors of such beneficiary's estate)." (Italics added.) If a beneficiary fails to effectively appoint any subtrust assets, then upon the beneficiary's death, the subtrust assets are to be divided among and held in separate subtrusts for the beneficiary's lineal descendants then living or, if no lineal descendants are then living, then to other categories of lineal descendants of Shep. Shep's trust defines lineal descendant as including biological children.

2. The Robert and Haley Trust

Robert and Haley created their own trust in 2010 and executed a restatement of the trust in 2013 (the Robert and Haley trust). Robert and Haley are to be paid income from

the trust during their lifetimes, and principal from the trust is to be paid to them upon request. The trust may be amended or revoked even after the death of one spouse. Upon the death of both of them, $50,000 is to be distributed to Robert's daughter, Zoe, for education, and the balance of the trust estate is to be distributed to Haley's mother, Aldene Gordon.

3. Robert's Will

On December 17, 2010, Robert executed a will in which he exercised the power of appointment over the assets of his subtrust created by Shep. Robert's will provided that all the assets in his subtrust were to be distributed to the trustee of the Robert and Haley trust.

C. *The Trust Proceedings*

Shep died in Florida on October 6, 2009. Following Shep's death, Robert became trustee of the subtrust created for him by Shep's trust.

Robert died on April 23, 2013, while a resident of Santa Cruz County. Following Robert's death, Weiss became the trustee of Robert's subtrust, and Haley was the sole surviving trustee of the Robert and Haley trust. The assets of Robert's subtrust included real property in California, interests in several companies, and funds in two accounts.

1. Haley's Amended Petition

In 2014, Haley, as trustee of the Robert and Haley trust, initiated an action in probate court. In November 2014, she filed a verified amended petition for an order confirming trust assets. (Prob. Code, § 850, subd. (a)(3)(B).)[2] In the petition, Haley alleged that she was entitled to assets from Robert's subtrust as a result of Robert's exercise of the power appointment, but that Weiss, the trustee of Robert's subtrust, had distributed only some of those assets and had requested that Haley file the petition before

[2] All further statutory references are to the Probate Code unless otherwise indicated.

any further distributions would be made. Haley sought an order transferring all the assets in Robert's subtrust to her.

2. The Probate Examiner's Recommendation

The probate examiner for the court recommended that Haley's petition be denied. In the examiner's notes, which were provided to Haley before the hearing on her petition, the examiner explained that Shep's trust did not give Robert the power to appoint his interest in his subtrust to the Robert and Haley trust. According to the examiner, Robert "only had the power to appoint his subtrust to any of Shep Brozman's lineal descendants or their spouses. Clearly, the Robert and Haley Brozman Trust is not a lineal descendant of Shep Brozman." (Underscoring omitted.) The examiner stated that because the power of appointment exercised in Robert's will was invalid, Robert's subtrust should be distributed to his lineal descendant, his daughter Zoe, and held in a separate trust for her benefit pursuant to the language of Shep's trust.

3. Weiss's Response

In a verified response, Weiss, the trustee of Robert's subtrust, stated that he had distributed a "small percentage" of the assets of Robert's subtrust to Haley before receiving advice from counsel. Weiss had since requested that a petition be filed to direct and authorize him regarding "the further distribution of assets" from Robert's subtrust.[3]

4. Haley's Supplement to the Amended Petition and Attorney Jordan Klingsberg's Declaration

Haley responded to the issues raised in the probate examiner's notes by filing a verified "supplement" to her amended petition. Haley contended that the clause in Robert's will, exercising his power of appointment over his subtrust, "was precisely written to match the directions" that Robert had received from the attorney who had

[3] Weiss has filed a "statement of neutrality" in this court, indicating that he will not be taking a position in this appeal as the trustee of Robert's subtrust.

drafted Shep's trust, Jordan Klingsberg. According to Haley, Robert had asked for and obtained "specific directions" from Klingsberg "as to how to word the exercise of the power of appointment over [Robert's subtrust] in [Robert's will] and included the clause verbatim as directed so as to match Shep Bozman's intent."

Haley also provided a declaration from attorney Klingsberg. Klingsberg indicated that he had drafted Shep's trust, which included Robert's subtrust, under Florida law. Klingsberg stated that the language of Shep's trust, which Klingsberg purported to quote, allowed Robert to appoint assets "*to or for the benefit*" of lineal descendants of Shep "or" a spouse. According to Klingsberg, other language in Robert's subtrust similarly stated that property subject to a power of appointment could be paid to a trustee under a trust agreement for the benefit of a permissible appointee. Klingsberg further stated:

". . . Based on discussions with Shep Brozman, the Settlor of [Robert's subtrust], it was his intention and desire that Robert have the power to appoint the remaining assets of his separate trust at his death, outright or in trust, to a lineal descendant of Shep Brozman or a spouse of a lineal descendant of Shep Brozman and I therefore included such a provision in [Robert's subtrust].

". . . After Robert informed me that he would like the remaining assets of his Trust to be transferred at his death to a revocable trust for the benefit of his wife, I provided Robert with sample language to appoint the remaining principal and undistributed income of his trust.

". . . Based on the clear and unambiguous terms and provision of [Robert's subtrust] and the Settlor's intent communicated to me, Robert had the right to exercise his power of appointment under [his subtrust] and appoint the remaining income and principal of his [subtrust] in favor of a trust for the benefit of his spouse, Haley Sage Robertson Brozman, that was revocable by her during her lifetime."

5. Zoe's Objection

In a verified objection, Zoe contended that Haley's amended petition should be denied because Robert failed to properly exercise his testamentary power of appointment. Zoe argued that only Shep's lineal descendants or their spouses were permissible appointees. According to Zoe, the Robert and Haley trust was not such a permissible appointee because (a) the trust was not a lineal descendant or a spouse, and (b) Haley's mother, who was to receive the residue of the Robert and Haley trust after a sum was paid to Zoe, was not a lineal descendant or a spouse. Because Shep's intention was to pass his assets to lineal descendants and not to others, such as the family member of a spouse, Zoe contended that the assets in Robert's subtrust should be held in trust for her, as the only living lineal descendant of Robert.

6. Haley's Reply

In reply, Haley contended that she was a permissible appointee as the spouse of Robert, who was a lineal descendant of Shep. She further contended that Robert could properly exercise his power of appointment in favor of a trust established for her benefit (that is, the Robert and Haley trust). Moreover, the Robert and Haley trust was revocable, and thus Haley's mother's "expectation" under that trust was "no different than the expectation she would have had" if Robert had simply exercised the power of appointment to give the assets to Haley outright and Haley then died intestate. To the extent her mother's contingent interest in the Robert and Haley trust rendered Robert's exercise of the power of appointment in excess of the terms of the power, Haley contended that the court could find Robert's power "unexercised with respect to the contingent interest."

7. The First Hearing on Haley's Amended Petition

The probate court held two hearings on Haley's amended petition. The first hearing was held in January 2015. The probate court found "very compelling" the use of the word "and" in the provision in Shep's trust giving Robert the power to appoint his

subtrust assets to Shep's "lineal descendants and their spouses." The court believed that the use of the word "and" meant that Robert "couldn't leave it to his wife alone" because "[t]hat's what 'and' usually means." The court observed that attorney Klingsberg in his declaration did not claim that the word "and" in the trust was a mistake and should have said "or." Rather, he "just says that 'and' essentially doesn't mean what 'and' normally means," and he "substitutes the word 'or.' " The probate court believed that Article II.D. of Shep's trust was "unambiguous" regarding the scope of the power of appointment, that no evidentiary hearing was necessary regarding Shep's intent, and that it could decide the issue as a matter of law.

Haley agreed with the probate court that the trust was "unambiguous" but "disagree[d] as to why it's unambiguous." Haley argued that "and" in this context "does mean 'or,' " and that Robert could properly exercise his power of appointment in favor of Haley directly or to a trust for her benefit. According to Haley, "lineal descendant and their spouses is an inclusive term; . . . you can leave it to a lineal descendant and you can leave it to a lineal descendant's spouse. You don't necessarily have to leave it to both."

Zoe expressed agreement with the probate court's interpretation of the trust. She also contended that Shep's trust was governed by Florida law, and apparently provided copies of Florida case law at the hearing.

Weiss, the trustee of Robert's subtrust, similarly agreed with the trial court that Shep's trust was not ambiguous, and that the court could decide the interpretation issue based upon the language of Shep's trust alone. Weiss believed that Robert did not have the power to appoint the assets of his subtrust to his wife, and that Robert had to include a lineal descendant in the appointment. Weiss also believed that Florida law applied to Shep's trust.

In response to Haley's request, the probate court set a further briefing schedule regarding the application of Florida law to the interpretation issues in the case. The court

also wanted briefing regarding a parenthetical in Article II.D. that excludes the beneficiary and the beneficiary's estate as permissible appointees.

8. The Supplemental Briefing

In her supplemental brief, Haley continued to argue that Robert properly exercised the power of appointment set forth in Shep's trust. Regarding the parenthetical in Article II.D. of Shep's trust excluding the "beneficiary" (Robert) and the "beneficiary's estate" as permissible appointees, Haley contended that this provision allowed the assets of Robert's subtrust to be excluded from his estate for tax purposes and that this was a "common estate planning technique." Haley also contended that the Florida law cited by Zoe was not helpful to Zoe's position, that Robert's exercise of the power of appointment was valid under Florida and California law, and that California law arguably applied to the case to the extent there was any conflict between the two states' laws. Haley further argued that to the extent it was impermissible for Robert to appoint his subtrust assets to a trust under which her mother was a beneficiary, Haley should be permitted to change the latter trust to eliminate her mother as a beneficiary.

In a declaration, Haley stated that Shep had appointed her as his "agent and attorney-in-fact" for the purpose of purchasing certain real property in California. Attached to her declaration was a document entitled "Power of Attorney – Special" and executed by Shep in 2008. Haley argued that Shep's appointment of her as his attorney in fact for the purpose of purchasing real property, which was now in Robert's trust and which was "one of the primary assets" covered by her petition, was "evidence of the trusted relationship [she] enjoyed with Shep Brozman, and is consistent with his intent to include her in the class of permissible appointees under [Robert's] power of appointment."

In a new declaration, attorney Klingsberg admitted that he had incorrectly quoted from Shep's trust and that the trust actually stated "lineal descendants *and* their spouses." (Italics added.) Klingsberg expressed regret for the incorrect quotation and explained

that the point of his earlier quotation was to emphasize certain other language in that sentence.

In her supplemental brief, Zoe contended that Florida law governed the issue of whether Robert properly exercised his power of appointment although she cited California law in support of various arguments. Zoe also contended that the probate court should not consider any extrinsic evidence in interpreting Shep's trust regarding the power of appointment because the parties agreed that the language was not ambiguous. Finally, Zoe argued that Robert had not properly exercised his power of appointment by appointing the assets of his subtrust to the Robert and Haley trust.

Haley filed a second supplemental brief in which she acknowledged that Robert was not a permissible appointee under the language of Shep's trust. She contended, however, that as Robert's spouse, she was a permissible appointee.

9. The Second Hearing on Haley's Amended Petition

The second hearing on Haley's amended petition was held on March 25, 2015. At the outset of the hearing, the probate court stated its tentative conclusions. The court indicated that Florida law applied to the issue of whether Robert exercised the power of appointment consistent with the terms of Shep's trust. The court also expressed its understanding from Haley's supplemental briefing that the parenthetical after the phrase "lineal descendants and their spouses" excluded Robert and his estate from the class of permissible appointees for tax purposes.

The probate court stated that it was "still . . . concerned about the use of the word 'and' " in the phrase "lineal descendants and their spouses." The court explained that it would be a "more difficult case" if " 'or' " was used, or if there was "a declaration from the attorney in Florida saying I meant to use 'or' but I used 'and.' " The court stated that the language was "not ambiguous," and therefore it was not going to consider extrinsic evidence. Based on the language of Shep's trust, the court believed the appointment power had to be exercised in favor of a lineal descendant and the spouse.

Haley made several arguments as to why the language should be interpreted to permit an appointment to a spouse alone. For example, she contended that the phrase at issue, "lineal descendants and their spouses," was prefaced by the phrase "one or more of," which meant that Robert could appoint "to any one of the members of the class." She also contended that the court's "restrictive" interpretation of the phrase at issue meant that the power of appointment could not be exercised in favor a lineal descendant alone, because that would "read the 'and' out." Haley further contended that the definition of "spouse" elsewhere in Shep's trust contemplated that a widow of a descendant was a permissible appointee. Although Haley stated that the trust "is not as unambiguous as we all would like to suggest," she immediately stated three times thereafter that she thought it was "unambiguous." To the extent the court was concerned with Haley's mother being a beneficiary under the Robert and Haley trust, Haley contended that the court could remove the provision regarding her mother.

Zoe acknowledged that Robert could appoint the assets of his subtrust to another trust, rather than directly to an individual, provided that the trust was for the benefit of a lineal descendant. Zoe also argued that "many estate planners" talking to their clients about beneficiaries and the power of appointment would discuss the matter in terms of allowing the appointment to "only your lineal descendant or . . . to the lineal descendant and their spouse." Zoe further contended that the phrase at issue should be interpreted to mean "to my lineal descendants and the spouse if they have a spouse." Zoe also argued that the numerous references to "lineal descendants" in Shep's trust clearly reflected an intent that the assets go to his lineal descendants.

10. The Court's Ruling

At the conclusion of the March 25, 2015 hearing, the probate court denied Haley's amended petition seeking to transfer assets from Robert's subtrust to the Robert and Haley trust. The court determined that Shep's trust was unambiguous, and that Robert's exercise of the power of appointment was not effective because it did not include lineal

descendants. The court further ruled that even if Robert could exercise the appointment power in favor of his spouse Haley, his appointment to a trust that "included a contingent remainder beneficiary that was not a lineal descend[a]nt made that power of appointment ineffective."

A written order denying Haley's amended petition was filed on April 27, 2015. In the order, the probate court stated, "Based upon the stipulation of the parties the Court finds the *Shep Brozman Trust* is not ambiguous as to the power of appointment granted [Robert] in [Robert's subtrust] and, therefore, extrinsic evidence is inadmissible." The court further stated that Robert did not properly or effectively exercise the power of appointment because: (1) Haley was not a permissible appointee, (2) the Robert and Haley trust was not a permissible appointee, and (3) Robert's exercise of the power did not include a lineal descendant of Shep.

III. DISCUSSION

Haley contends that her husband Robert properly exercised the power of appointment pursuant to his father Shep's trust by appointing subtrust assets to the Robert and Haley trust. She argues that Shep's trust, which gave Robert the power to appoint the subtrust assets to "one or more of any of [Shep's] lineal descendants and their spouses," included Haley alone, or a trust for her benefit, as a permissible appointee. She also contends that Robert's exercise of the appointment power was not "voided" by the inclusion of her mother as a "contingent residual beneficiary" of the Robert and Haley trust. Haley further argues that attorney Klingsberg's declarations provided uncontradicted evidence that Shep intended Haley to be a permissible appointee, and that the probate court prejudicially erred in excluding this extrinsic evidence of intent.

Zoe contends that her father Robert had to exercise the power of appointment in favor of a lineal descendant, and that he could not exercise the power in favor of his spouse Haley alone. She also argues that the appointment to the Robert and Haley trust was ineffective because Haley's mother was a residuary beneficiary of that trust but not a

lineal descendant of Shep or a spouse of a lineal descendant of Shep. Zoe contends that the probate court considered Klingsberg's declarations and correctly concluded that such extrinsic evidence was inadmissible in interpreting Shep's trust.

A. *Applicability of Florida or California Law*

As an initial matter, we first address which state's law applies to the trust interpretation issue. Haley contended in her opening brief on appeal that California law applies although in her reply brief she also cites Florida law. Zoe contends that Florida law applies but she also cites California law. Neither party has identified a difference between the two states' laws that would affect the disposition in this case.

Shep's trust states that it is governed by Florida law. In general, "[t]he meaning and legal effect of a disposition in an instrument is determined by the local law of a particular state selected by the transferor in the instrument." (Prob. Code, § 21103.) None of the parties argues that an exception to this general rule applies. Therefore, we will apply Florida law in determining whether Robert properly exercised the power of appointment set forth in Shep's trust. We further determine that even if California law applies, we reach the same disposition in this case as under Florida law.

B. *General Rules Regarding Trust Interpretation*

Under Florida law, "the intent of the settlor of a trust is controlling. [Citations.]" (*Knauer v. Barnett* (Fla. 1978) 360 So.2d 399, 405 (*Knauer*).) "However, it is the intention which the testator expresses in the instrument that governs, not that which he might have had in mind when it was executed. [Citation.]" (*Barnett First Nat. Bank of Jacksonville v. Cobden* (Fla.Dist.Ct.App. 1981) 393 So.2d 78, 80 (*Barnett First Nat. Bank*).) "In determining the [settlor's] intent, the court should not 'resort to isolated words and phrases'; instead, the court should construe 'the instrument as a whole,' taking into account the general dispositional scheme. [Citations.]" (*Roberts v. Sarros* (Fla.Dist.Ct.App. 2006) 920 So.2d 193, 195 (*Roberts*).) "[W]ords should be given their ordinary and usual meaning." (*Barnett First Nat. Bank, supra*, at p. 80.) " ' "[N]o word

or part of an agreement is to be treated as a redundancy or surplusage if any meaning, reasonable and consistent with other parts, can be given to it[.]" ' [Citations.]" (*Roberts, supra,* at p. 196.)

Similarly, under California law, " '[t]he primary rule in construction of trusts is that the court must, if possible, ascertain and effectuate the intention of the trustor or settlor.' [Citation.] 'The intention of the transferor as expressed in the [trust] instrument controls the legal effect of the dispositions made in the instrument.' [Citations.]" (*Crook v. Contreras* (2002) 95 Cal.App.4th 1194, 1206 (*Crook*).)

Under California law, the following rules of construction "apply where the intention of the transferor is not indicated by the instrument." (§ 21102, subd. (b); see § 21101.) "The words of an instrument are to be given their ordinary and grammatical meaning unless the intention to use them in another sense is clear and their intended meaning can be ascertained." (§ 21122.) Further, "[t]he words of an instrument are to receive an interpretation that will give every expression some effect, rather than one that will render any of the expressions inoperative." (§ 21120.) "All parts of an instrument are to be construed in relation to each other and so as, if possible, to form a consistent whole. If the meaning of any part of an instrument is ambiguous or doubtful, it may be explained by any reference to or recital of that part in another part of the instrument." (§ 21121.)

California law further provides that " ' " '[t]he interpretation of a written instrument, including a . . . declaration of trust, presents a question of law unless interpretation turns on the competence or credibility of extrinsic evidence or a conflict therein. Accordingly, a reviewing court is not bound by the lower court's interpretation but must independently construe the instrument at issue. [Citations.]' [Citations.]" [Citation.]' " (*Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 73.)

C. *Whether Robert Properly Exercised His Power of Appointment*

Shep's trust created separate subtrusts, and the beneficiary of one of those subtrusts was his son Robert. Pursuant to Article II.D. of Shep's trust, Robert had the power of appointment over assets remaining in the subtrust upon Robert's death as follows: "If a beneficiary dies with assets remaining in his or her separate trust, upon the beneficiary's death the beneficiary may appoint his or her trust to or for the benefit of one or more of any of my *lineal descendants and their spouses* (excluding from said class, however, such beneficiary and such beneficiary's creditors, estate, and creditors of such beneficiary's estate)." (Italics added.) Robert in his will attempted to exercise the power of appointment by distributing the assets of his subtrust to the trustee of the Robert and Haley trust.

Haley acknowledges that Robert could not appoint the subtrust assets to himself in view of the parenthetical in Article II.D. of Shep's trust which excludes the "beneficiary" and the "beneficiary's . . . estate" from the class of permissible appointees. For the following reasons, we determine that Robert also did not have the power to appoint the assets to or for the benefit of Haley.

First, the express language in Shep's trust regarding Robert's power of appointment precluded Robert from appointing subtrust assets directly to Haley or to a trust for her benefit. (See *Barnett First Nat. Bank, supra,* 393 So.2d at p. 80; *Crook, supra,* 95 Cal.App.4th at p. 1206.) In Article II.D of Shep's trust, the class of permissible appointees is expressly identified as Shep's "lineal descendants *and* their spouses." (Italics added.) "The ordinary and usual usage of 'and' is as a conjunctive, meaning ' "an additional thing," ' 'also' or 'plus.' [Citations.]" (*In re C.H.* (2011) 53 Cal.4th 94, 101-102.) In contrast, "the word 'or' implies a disjunctive or alternative meaning. [Citations.]" (*Melamed v. City of Long Beach* (1993) 15 Cal.App.4th 70, 79; see *Florida Birth-Related Neurological Injury Comp. Assn. v. Florida Div. of Admin. Hearings* (Fla. 1997) 686 So.2d 1349, 1355.) Consequently, based on the ordinary meaning of the word

"and" in the phrase "lineal descendants and their spouses," Robert could not exercise the power of appointment in favor of his spouse, Haley, alone. Rather, Robert had to exercise the power of appointment in favor of at least one lineal descendant of Shep. Further, Shep's trust expressly excludes the subtrust's beneficiary, that is, Robert, and his estate from the class of permissible appointees. In other words, Robert could not appoint the subtrust assets to himself or his estate. Accordingly, based on (1) the requirement that a lineal descendant, such as Robert, be *included* with any appointment power exercised in favor of a spouse, such as Haley, and (2) the express *exclusion* of Robert and his estate from the class of permissible appointees, the appointment power could *not* be exercised in favor of Robert and/or Haley, or a trust established for the benefit of Robert and/or Haley, such as the Robert and Haley trust.

Second, interpreting the phrase "lineal descendants and their spouses" as requiring the appointment power to be exercised in favor of at least one lineal descendant is consistent with Shep's intent to pass the subtrust assets to lineal descendants. (See *Roberts, supra*, 920 So.2d at p. 195; *Crook, supra*, 95 Cal.App.4th at p. 1206; see *Estate of Joslyn* (1995) 38 Cal.App.4th 1428, 1431, 1434 [power of appointment to " 'lawful living descendants (other than said beneficiary), spouses of such descendants, or the spouse of such beneficiary' " indicated that decedent "did not intend to keep her estate strictly within blood lines"]; *Estate of Joslyn, supra*, at p. 1435.) Shep's trust sets forth specific gifts to certain individuals who were not his lineal descendants, such as his sisters and at least one friend. The initial beneficiaries of the subtrusts, however, were exclusively his *lineal descendants*, that is, his three sons. Shep's trust further provided that if a son failed to survive Shep, then the son's *lineal descendants* then living would be the beneficiaries of the subtrust. If a son failed to effectively appoint subtrust assets, Shep's trust provided that the assets would be held in subtrusts for the son's *lineal descendants* then living or, if none, then to other categories of lineal descendants of Shep.

These three provisions regarding the subtrusts thus reflects Shep's intent to pass assets in those subtrusts to lineal descendants.

On the other hand, interpreting "and" to mean "or" in the phrase, "lineal descendants and their spouses," could result in individuals who are not lineal descendants, such as Haley, receiving those assets alone, contrary to Shep's intent as expressed in his trust. If Shep had intended that a lineal descendant's spouse *alone* could be the beneficiary of a subtrust, then presumably such spouses would have been identified (1) as initial subtrust beneficiaries, (2) as beneficiaries if a son failed to survive Shep, and/or (3) as a beneficiary if a son failed to effectively appoint subtrust assets. Instead, in each of these three circumstances, Shep's trust provides that the subtrust beneficiaries are his or his son's lineal descendants. Consequently, interpreting the appointment language in Article II.D. of Shep's trust as requiring the appointment of subtrust assets to at least one lineal descendant is consistent with Shep's intent, as reflected in the other three provisions concerning the subtrusts, and the only reasonable construction of the appointment language.

On appeal, Haley quotes from Shep's trust regarding the power to appoint to "*one or more of any* of my lineal descendants and their spouses." (Italics added.) She argues that "the class of permissible appointees was made up of Shep Brozman's lineal descendants and the spouses of Shep Brozman's lineal descendants," and that the phrase "one or more of any" means the appointment power may "be exercised in favor of only a single member of the class," such as a spouse.

We are not persuaded by Haley's argument. Under Haley's construction, all of Shep's sons could have appointed their subtrust assets to a spouse alone, without a lineal descendant receiving any of the assets. As we have just explained, however, lineal descendants were the only permissible beneficiaries of the subtrusts in three other circumstances, including when there is an *ineffective* appointment. Interpreting the language regarding the *exercise* of the appointment power as allowing the appointment

of subtrust assets to a spouse alone, without a lineal descendant receiving any of the assets, is not consistent with this dispositional scheme. In contrast, interpreting the appointment language as requiring it to be exercised in favor of a lineal descendant, and not a spouse alone, is the only construction consistent with Shep's dispositional scheme regarding subtrust assets and the ordinary meaning of "and." Consequently, the only reasonable construction of the language quoted by Haley regarding the power to appoint to "*one or more of any* of my lineal descendants and their spouses" is that "one or more of any" refers to Shep's "lineal descendants" and not independently to "spouses." (Italics added.)

Haley also relies on Article III.F. of Shep's trust which states in part: "Powers of Appointment. Property subject to a power of appointment shall be paid to, or retained by the Trustee or *paid to any trustee under any will or trust agreement for the benefit of, such one or more permissible appointees, in such amounts and proportions*, granting such interests, powers and powers of appointment, and upon such conditions including spendthrift provisions *as the holder of such power* (i) in the case of a power exercisable upon the death of such holder, *appoints in his* or her *will* or in a trust agreement revocable by him or her until his or her death . . . ." (Italics added.) Based on the italicized language, Haley contends that the appointment power could be exercised in favor of a spouse alone, without the inclusion of a lineal descendant.

Haley's argument is not persuasive. Although the quoted sentence refers to "permissible appointees," the sentence does not define the class of permissible appointees or otherwise indicate whether a spouse alone is a permissible appointee.

Haley further relies on the definition of a "spouse" as set forth in Shep's trust. Article III.E.8. of Shep's trust states in this regard: "E. Definitions. In this Agreement, [¶] . . . [¶] 8. Spouse. A person's '*spouse*' includes only a spouse then married to and living as husband and wife with him or her, or a spouse who was married to and living as husband and wife with him or her at his or her death. The following rules apply to each

person who is a beneficiary or a permissible appointee under this Trust Agreement and who is married to a descendant of mine. Such a person will cease to be a beneficiary and will be excluded from the class of permissible appointees upon: [¶] a. the legal termination of the marriage to my descendant (whether before or after my death), [¶] b. the death of my descendant if a dissolution of marriage proceeding was pending when he or she died, or [¶] c. the remarriage of that person after the death of my descendant. [¶] The trust will be administered as if that person had died upon the happening of the terminating event described above." Haley contends that "[i]f, as in the instant case, those disqualifying conditions [set forth in a. to c.] are not present," then she, as the spouse of Shep's son Robert, "remains a member of the class of permissible appointees."

We are not persuaded by Haley's argument. Article III.E.8. of Shep's trust, as relied on by Haley, simply defines a spouse and sets forth certain "terminating event[s]" that cause a person to "cease to be a beneficiary" and to "be excluded from the class of permissible appointees." The fact that Haley meets the definition of a spouse and has not been excluded from the class of permissible appointees by virtue of a "terminating event" under Article III.E.8. does not mean that she *is* a permissible appointee pursuant to Article II.D. of Shep's trust. As we have explained, Haley is *not* a permissible appointee based on Article II.D.'s (1) exclusion of Robert as a permissible appointee and (2) requirement that the appointment be made to Shep's "lineal descendants and their spouses." Based on Article II.D.'s express language identifying who may be appointed subtrust assets, and based on Shep's intent with respect to the subtrusts in general, we do not believe that the definition of a spouse under Article III.E.8. may be construed as allowing any person who meets that definition to be a permissible appointee. (See *Estate of Kearns* (1950) 36 Cal.2d 531, 535 ["If the words are repugnant to the clear intention disclosed by the other parts of the instrument, they may be regarded as surplusage or restricted in application."]; *Roberts, supra*, 920 So.2d at p. 196.)

Lastly, we are not persuaded by Haley's argument that construing the word "and" in the phrase "lineal descendants and their spouses" would mean that "an unmarried lineal descendant would . . . be excluded from the purported class because he or she would not qualify as a 'lineal descendant *and* spouse.' " In view of Shep's intent that subtrust assets pass to lineal descendants, the most reasonable construction of "lineal descendants and their spouses" is that the appointment *must* be exercised in favor of a lineal descendant and *may* also include the lineal descendant's spouse if one exists.

In sum, under Florida law and California law we determine that Shep's trust required Robert to exercise his power of appointment in favor of a lineal descendant of Shep other than Robert himself, and that Robert failed to effectively exercise the power by appointing his subtrust assets to the trustee of the Robert and Haley trust.

D. *Exclusion of Extrinsic Evidence of Shep's Intent*

In support of her petition in the probate court, Haley submitted declarations from attorney Klingsberg, who drafted Shep's trust. Klingsberg stated it was Shep's intent that Robert have the power to appoint his subtrust assets to a lineal descendant *or* a spouse of a lineal descendant. The probate court in its written order ruled that extrinsic evidence was inadmissible for the following reason: "Based upon the stipulation of the parties the Court finds the *Shep Brozman Trust* is not ambiguous as to the power of appointment granted [Robert] in [Robert's subtrust] and, therefore, extrinsic evidence is inadmissible."

On appeal, Haley contends that the parties never stipulated below that the appointment language was unambiguous and that in any event, the probate court should have admitted Klingsberg's declarations as extrinsic evidence of Shep's intent under California law. Haley argues that the court's exclusion of extrinsic evidence was prejudicial.

Zoe contends that the probate court *did* consider Klingsberg's declaration and that the court correctly concluded such extrinsic evidence was inadmissible in interpreting Shep's trust.

We determine that Haley fails to show prejudicial error as a result of the probate court's exclusion of extrinsic evidence.

First, all the parties agreed below that Shep's trust was unambiguous with respect to Robert's power of appointment. Haley in particular expressed her belief that Shep's trust was unambiguous at both the first and second hearings on her petition. Significantly, even in her opening brief on appeal Haley states that she "agrees with the trial court that the language of the power of appointment contained in the Shep Brozman Trust is unambiguous, in that there is only one interpretation to which that language is reasonably susceptible."

Second, to the extent the probate court was required to consider Klingsberg's declarations under California law, we determine that the court did not prejudicially err in concluding that such extrinsic evidence was inadmissible.[4]

In *Estate of Russell* (1968) 69 Cal.2d 200 (*Russell*), the California Supreme Court set forth the rules for extrinsic evidence and the interpretation of a will. These rules are pertinent to the interpretation of the trust instrument in this case. (*Citizens Business Bank v. Carrano* (2010) 189 Cal.App.4th 1200, 1205.)

The *Russell* court explained that "extrinsic evidence is admissible 'to explain any ambiguity arising on the face of a will, or to resolve a latent ambiguity which does not so appear.' [Citations.]" (*Russell, supra,* 69 Cal.2d at pp. 206-207, fn. omitted.) Ambiguity exists "when, in the light of the circumstances surrounding the execution of an instrument, 'the written language is fairly susceptible of two or more constructions.' [Citations.]" (*Id.* at pp. 211-212.)

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[4] Under Florida law, "unless the trust instrument is ambiguous the intent of the settlor must be ascertained from that which lies within the four corners of the instrument itself, and no extrinsic evidence of the settlor's intent is admissible. [Citations.]" (*Knauer, supra*, 360 So.2d at p. 405.) In this case, the probate court determined that Shep's trust was unambiguous and therefore under Florida law, the court could properly exclude extrinsic evidence of Shep's intent.

The *Russell* court held that "it cannot always be determined whether the will is ambiguous or not until the surrounding circumstances are first considered." (*Russell, supra*, 69 Cal.2d at p. 213.) The court explained that, "[i]n order to determine initially whether the terms of any written instrument are clear, definite and free from ambiguity the court must examine the instrument in the light of the circumstances surroundings its execution so as to ascertain what the parties meant by the words used. Only then can it be determined whether the seemingly clear language of the instrument is in fact ambiguous." (*Id.* at pp. 208-209, italics omitted.) "Failure to enter upon such an inquiry is failure to recognize that the 'ordinary standard or "plain meaning," is simply the meaning of the people who did *not* write the document.' [Citation.]" (*Id.* at p. 211.)

For example, the *Russell* court determined that extrinsic evidence was "properly considered in order to ascertain what testatrix meant by the words of the will, including the words: 'I leave everything I own Real & Personal to Chester H. Quinn & Roxy Russell.' " (*Russell, supra,* 69 Cal.2d at p. 214.) Specifically, extrinsic evidence was properly admitted "to raise and resolve the latent ambiguity as to Roxy Russell and ultimately to establish that Roxy Russell was a dog." (*Ibid.*)

However, the *Russell* court also stated that "extrinsic evidence as to the circumstances under which a written instrument was made is ' "admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible" [citation], and it is the instrument itself that must be given effect. [Citations.]' [Citation.]" (*Russell, supra*, 69 Cal.2d at p. 211, fn. omitted.) In other words, "an ambiguity, whether patent or latent, must reside *in* the will. '[T]he court must attempt to ascertain the intent of the testator by examining the will as a whole and the circumstances surrounding its execution.' [Citations.] A court cannot ' "invoke [extrinsic] evidence to write a new or different instrument." ' (*Russell, supra,* 69 Cal.2d at p. 209.)" (*Estate of Dye* (2001) 92 Cal.App.4th 966, 978.) As one appellate court has explained, "extrinsic evidence cannot be used to show that when the parties said 'Bunker Hill Monument' they

meant ‘the Old South Church’ or that when they said ‘pencils’ they really meant ‘car batteries.’ [Citations.]” (*Curry v. Moody* (1995) 40 Cal.App.4th 1547, 1554.)

Thus, “ ‘[t]he decision whether to admit parol [or extrinsic] evidence involves a two-step process. First, the court provisionally receives (without actually admitting) all credible evidence concerning the parties’ intentions to determine “ambiguity,” i.e., whether the language is “reasonably susceptible” to the interpretation urged by a party. If in light of the extrinsic evidence the court decides the language is “reasonably susceptible” to the interpretation urged, the extrinsic evidence is then admitted to aid in the second step--interpreting the [instrument]. [Citation.]’ ” (*Estate of Kaila* (2001) 94 Cal.App.4th 1122, 1133.) Whether an instrument is ambiguous is a question of law, and an appellate court independently reviews the instrument to determine whether ambiguity exists. (See *Colonial Ins. Co. v. Montoya* (1986) 184 Cal.App.3d 74, 82.)

In this case, it appears from the probate court’s comments at the hearings on Haley’s amended petition that it considered (1) the substance of Klingsberg’s statements regarding Shep’s intent and (2) whether Shep’s trust was reasonably susceptible to the interpretation urged by Haley, that is, the power of appointment could be exercised in favor of a lineal descendant’s spouse alone.

For example, at the first hearing on Haley’s amended petition, the probate court found “very compelling” the use of the word “and” in the provision giving Robert the power to appoint his subtrust assets to Shep’s “lineal descendants and their spouses.” The court believed that the use of the word “and” meant that Robert “couldn’t leave it to his wife alone” because “[t]hat’s what ‘and’ usually means.” The court observed that Klingsberg in his declaration did not claim that the word “and” in the trust was a mistake and should have said “or.” Rather, he “just says that ‘and’ essentially doesn’t mean what ‘and’ normally means,” and he “substitutes the word ‘or.’ ” The court indicated that it believed Shep’s trust was “unambiguous” regarding the scope of the power of

appointment, that no evidentiary hearing was necessary regarding Shep's intent, and that it could decide the issue as a matter of law.

At the second hearing, the probate court stated that it was "still . . . concerned about the use of the word 'and' " in the phrase "lineal descendants and their spouses." The court explained that it would be a "more difficult case" if " 'or' " was used, or if there was "a declaration from the attorney in Florida saying I meant to use 'or' but I used 'and.' "

It thus appears that the probate court considered (1) the substance of Klingsberg's statements regarding Shep's intent and (2) whether Shep's trust was reasonably susceptible to the interpretation urged by Haley, that is, the power of appointment could be exercised in favor of a lineal descendant's spouse alone. The court ultimately ruled, however, that Shep's trust was not ambiguous regarding the Robert's power of appointment and that extrinsic evidence was inadmissible.

We determine that the probate court did not prejudicially err in determining that Shep's trust was unambiguous regarding the power of appointment and that extrinsic evidence was inadmissible. As we have explained, the power of appointment had to be exercised in favor of at least one lineal descendant and could not be exercised in favor of a lineal descendant's spouse alone. In view of (1) the ordinary meaning of the words used in the appointment power provision in Article II.D. and (2) Shep's intent with respect to the subtrusts in general, Shep's trust is not reasonably susceptible to Haley's construction that subtrust assets may be appointed to a spouse alone and to the exclusion of any lineal descendant. The probate court therefore did not prejudicially err in excluding extrinsic evidence of Shep's intent as set forth in Klingsberg's declarations.

Haley cites *Estate of Duke* (2015) 61 Cal.4th 871 for the proposition that extrinsic evidence of intent may be considered even when a testamentary instrument is unambiguous. In *Estate of Duke*, the California Supreme Court held that "an unambiguous will may be reformed if clear and convincing evidence establishes that the

will contains a *mistake* in the expression of the testator's intent at the time the will was drafted and also establishes the testator's actual specific intent at the time the will was drafted." (*Id.* at p. 875, italics added.) Haley did not contend below, nor does she contend on appeal, that the extrinsic evidence she proferred was relevant and necessary to correct a *mistake* in Shep's trust. *Estate of Duke* therefore does not support Haley's contention that extrinsic evidence should have been admitted in this case.

In sum, we determine that Robert could not appoint subtrust assets to himself in view of the language in Shep's trust which excludes the "beneficiary" and the "beneficiary's . . . estate" from the class of permissible appointees. Further, based on the ordinary meaning of the word "and" in the phrase "lineal descendants and their spouses," and consistent with Shep's intent to pass the subtrust assets to lineal descendants, we determine that Robert could not exercise the power of appointment in favor of his spouse, Haley, alone. Rather, Robert had to exercise the power of appointment in favor of at least one lineal descendant of Shep. Accordingly, based on (1) the requirement that a lineal descendant, such as Robert, be *included* with any appointment power exercised in favor of a spouse, such as Haley, and (2) the express *exclusion* of Robert and his estate from the class of permissible appointees, we determine that the appointment power could *not* be exercised in favor of Robert or Haley, or a trust established for the benefit of Robert or Haley, such as the Robert and Haley trust. We therefore determine that Robert failed to effectively exercise his appointment power when he appointed his subtrust assets to the trustee of the Robert and Haley trust. Although Robert in his will provided that all the assets in his subtrust were to be distributed to the trustee of the Robert and Haley trust, his appointment power over the subtrust assets did not allow him to do so. Lastly, we determine that Haley fails to show prejudicial error from the probate court's exclusion of extrinsic evidence of Shep's intent in construing Robert's power of appointment.

IV. DISPOSITION

The April 27, 2015 order is affirmed.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MIHARA, J.

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